Supreme Court, U.S.
FILED
DEC 16 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 618

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 450, AFL-CIO,
Petitioner,

v.

CONSTRUCTION EMPLOYERS' ASSOCIATION OF TEXAS, ET AL,
Respondents.

PETITIONER'S MOTION FOR REHEARING

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COMES NOW Petitioner, International Union of Operating Engineers, Local 450, AFL-CIO, and files this Motion for Rehearing; and as grounds for same would

respectfully show this Honorable Court that the National Labor Relations Board ruled on November 25, 1970, under circumstances very similar to those in the case at bar, that there was no jurisdictional "dispute" to be determined in a proceeding under Section 10(k) of the National Labor Relations Act, as amended. Because Petitioner feels that this new case will bear heavily upon final rendition of judgment in the case before this Court on this petition, it will be necessary to set the recent decision out in some detail.

In Hoisting and Portable Engineers, Local No. 450 and United Engineers and Constructors, Inc. and General Drivers Warehousemen and Helpers Local Union

No. 968, /186 N.L.R.B. No. 125 (1970)/ 75 LRRM 1424, the dispute involved the operation of a fuel truck in Texas City, Texas, where the Employer was under a contract with Union Carbide Company for the construction of new plant units and the maintenance of existing plants. The project required the use of gasoline and diesel-powered equipment. During the last four years, the Company apparently used four different fuel trucks on the Union Carbide job for the fueling on non-mobile equipment.

The original fuel truck was a flat bed truck with two tanks, one for gasoline and one for diesel, from which the fuel was dispensed with a hand pump. The driver of the truck was a member of

the Teamsters. In addition, an operator and an oiler, members of the Operating Engineers, alternated on the tasks of pumping fuel, holding and directing the hose and checking oil and water.

In February, 1967, the original flat bed truck was replaced by a metal enclosed truck with two tanks from which gasoline and diesel fuel were dispensed by a power take-off or lever located on the instrument panel in the driver's cab of the truck. The Employer assigned all functions, including driving, control of the power take-off and dispensing of the fuel to a two-man crew consisting of an operator and an oiler, both members of Operating Engineers, who performed these duties interchangeably. In 1968

the Employer reverted to use of the same type of vehicle as the original flat-bed truck and employed a three-man crew whose duties and union affiliation were like those of the 1966 crew.

Sometime in early 1970 the Employer decided to replace this truck with a flatbed truck which, like the 1967 truck, had a mechanized pumping device. The Employer made an assignment covering the operation of the new fuel truck which provided for the driving of the same by a Teamster and for the fueling operation to be handled by an operator (member of Petitioner). This case had its origin in the failure of the Employer to also assign an oiler to help the operator, as provided in the Working Agreement between

Petitioner and the Company.

On the morning of March 19, 1970, the Employer commenced using this truck in accordance with its new assignment. Engineers refused to man the operation without an Oiler and on March 24, 1970, the company filed a charge against Petitioner alleging that it violated Section 8(b)(4)(D) of the Act by engaging in a work stoppage in protest of the Company's assignment of the fuel truck to Teamsters rather than to Engineers. The Regional Officer concluded that both Teamsters and Engineers were claiming the work of operating the fuel truck in question and ordered a 10(k) hearing, which hearing was conducted on May 5, 1970.

Petitioner moved that the notice

of hearing be quashed on the ground that there was no jurisdictional dispute between it and the Teamsters. At the hearing, both unions formally disclaimed on the record any interest or right to the work claimed by the other with respect to the operation of the fuel truck. The Operating Engineers asserted that it did not oppose the assignment of the driving and control of the fuel power take-off to a member of the Teamsters. The Teamsters agreed that it had no objection to the presence of a second member of the Engineers, so long as one Teamster remained on the job.

To make the position taken by the unions at the hearing crystal clear, Petitioner quotes as follows from the

transcript of the record in that case:

"HEARING OFFICER: May we have a brief statement, then from the Teamsters, please.

MR. WATSON (Attorney for Teamsters): Very briefly, Mr. Hearing Officer, it was my impression that there is no dispute between the two unions. I gather Mr. Clinton feels it's to his advantage to have a dispute between the two unions, and so he has interjected something toward that end. At least that is my impression of what his position is.

But in any event, with regard to the facts on this particular case, and this particular truck, the Teamsters Union is perfectly willing to abide by the status quo arrangement as it relates to the work in dispute. The work in dispute, as I understand it, and in line with the Hearing officer's statement earlier, is the operation of two small knobs on the dashboard of the truck which activate fuel pumps.

The status quo with regard to that work is that it's now being done by the Teamster driver. The

practicalities are that it almost has to be that way because the driver has to push in the clutch to activate the pumps.

In that sense, it appears to me that there is no dispute. Apparently there is a question of whether or not a third man should be put on the truck. I don't gather that the Operating Engineers are claiming that a third man should be put on the truck to operate those two knobs. I don't know what they do want the third man to do. But that does not appear to me to be in issue in this proceeding, whether or not a third man is to be added.

We have no objection if the company wants to put a third man on there. It's fine with us.

So briefly stated, it doesn't appear to me that there is a jurisdictional dispute with respect to the particular work in issue, or at all." (TR 21-22)

The Hearing Officer then requested the attorney for Engineers to state the Engineers' position, whereupon Mr. Combs

said as follows:

> "That is our basic position, your Honor, but in this particular hearing I am willing to -- I agree thoroughly with the statement made by Mr. Watson. If the operation of the truck be understood to include the operation of these two levers, then we still go along with him and say we do not claim the right to operate the truck, including the two levers. So, therefore, there is no controversy between the two unions as to the operation of the truck (TR.23)" (Emphasis supplied).

It was thus made abundantly clear to the National Labor Relations Board that there was no conflict whatever between the two unions and that, therefore, there was no jurisdictional "dispute" between them, the only dispute being between Engineers and the Company over whether an oiler should also have been assigned to assist the operator

in performing the fueling operation.

The Hearing Examiner ruled, and the Board affirmed, as follows:

> "There is no substantial evidence that two competing groups of employees are contending for the work described above. Thus, the Operating Engineers has explicitly disclaimed any interest in the work assigned to the driver-member of Teamsters, and the latter organization has not claimed the work assigned to the engineer-member of the Operating Engineers.
>
> As noted above, the Employer argued that all work on the fuel truck should be under the exclusive jurisdiction of the Teamsters, and the Operating Engineers pressed the employer to restore the position of oiler. We find that these opposing claims were essentially disputes between the Employer and the Operating Engineers.
>
> The Board has repeatedly held that Sections 8(b)(4)(D) and 10(k) of the Act were intended to deal with disputes between two or more competing employee groups claiming the right to perform certain tasks, and not as here, with disputes

> between a union and an employer where no such competing claims between rival groups of employees are involved.
>
> Accordingly, we find that there is herein no jurisdictional dispute within the meaning of Section 8(b)(4)(D) and Section 10(k) of the Act. We shall therefore quash the notice of hearing."

Petitioner anticipates that Respondent will contend that the case discussed above is not applicable to the instant case because it was not a damage action under Section 303 but a Section 10(k) hearing. As said by this Honorable Court in Longshoremen's Union v. Juneau Spruce Corp., 342 U.S. 237 (1952): "Section 8(b)(4)(D) and Section 303(a)(4) are substantially identical in the conduct condemned." Thus it is evident that a finding of an underlying Section 8(b)(4)(D)

jurisdictional "dispute" is a necessary prerequisite for either Section 10(k) hearing or a Section 303 damage suit.

In the case at bar the Millwrights specifically disclaimed any jurisdictional "dispute" with the Engineers, just as the Teamsters in the Hoisting and Portable Engineers case specifically disclaimed any jurisdictional dispute with Petitioner. This is evident from the testimony of Jack O. Fountain, Business Representative of Millwrights Local Union 2232:

> "Mr. Combs: I will ask you this: Did the Millwrights, either through you or anybody else, make a claim that the operation of those cranes in connection with that overhaul job was work that belonged to the Millwrights?
>
> Mr. Fountain: On this specific job, no sir. We did not tell

anybody, that I can recall, that definitely that was the work of the Millwrights."

* * *

"Mr. Combs: Did you ever say to Mr. Ashley that the Millwrights claim the work and that it belongs to Millwrights? And by that, I'm talking about the operation of the overhead crane.

Mr. Fountain: Mr. Combs, let me answer this way: In discussion with Ashley, I would say at different times that we had figured out ways and arguments that we might could argue that this work was Millwrights, yes, sir. <u>But truthfully, I don't think that he believed that the work was actually the work of the Millwrights.</u>

The Court: Well, you were sure trying to find a way to claim that it was such, weren't you?

Mr. Fountain: <u>No, sir, I didn't place any claim on that work.</u>

The Court: Well, you told Mr. Ashley, 'We'll cross that bridge when we get to it.' and you told him you were looking for a way to

claim it for the Millwrights.

Mr. Fountain: No Sir, I said at many times in discussion with Mr. Ashley we had discussed different ways that we might could claim the work.

The Court: Oh, you might claim it?

Mr. Fountain: Yes, sir.

The Court: All right. You just want to add the word 'might'? Put 'might'.

Mr. Fountain: I put 'might' in the first time, sir.

The Court: All right.

Mr. Combs: Did you ever make claim to it?

Mr. Fountain: You mean on this specific job?

Mr. Combs: Yes, sir.

Mr. Fountain: I don't recall making claim to this specific job, not that I can recall, Mr. Combs.

Mr. Combs: State whether or not you ever told Mr. Ashley that it

was not your work and you were not claiming it?

Mr. Fountain: Confidentially, Mr. Ashley had been in the turbine business much longer than I had, and he was always trying to figure out more ways economically to operate and he knew that the work wasn't any more--the millwrights' work on a turbine job--than it was on a cement plant.

Mr. Burch: Excuse me. I want to object to the witness' statement as to what Mr. Ashley knew and ask that it be stricken from the record.

The Court: Sustained. It may be removed.

Mr. Combs: Well, Mr. Fountain, I would like to ask you this question: If you were not claiming the work, why did your men do it?

Mr. Fountain: Because they were assigned the work. They were told to do the work.

Mr. Combs: Who told them to do the work?

Mr. Fountain: Mr. Ashley's supervision." (App. 173-175).

Ashley Hickham originally assigned the operation of the crane to the Millwrights for economic reasons (as found by Trial Court). The facts in the instant case exhibit purely and simply a dispute between the employer, who assigned the work to the Millwrights for economic reasons, and the Engineers. This kind of "dispute" is not of the nature of a jurisdictional dispute within the meaning of Section 8(b)(4)(D).

WHEREFORE, Premises Considered, Petitioner respectfully submits that this Honorable Court should grant this Motion for Rehearing and grant Petitioner's Petition for Writ of Certiorari and that this Honorable Court take jurisdiction and hear the case. At the risk of vio-

lating the Rules, Petitioner repeats that the question involved herein is of such importance and the decisions of the lower courts cloak the question in such ambiguity that this Court should hear the case and write an opinion, if for no other reason than to clarify and define the law applicable to this state of facts.

Respectfully submitted,

W. ARTHUR COMBS
1220 Americana Bldg.
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petitioner's Motion for Rehearing was mailed to Mr. V. Reagan Burch of Baker, Botts, Shepherd & Coates, Attorneys for Respondents, 1600 Esperson Building, Houston, Texas, on this 10 day of December, 1970.

W. ARTHUR COMBS

CERTIFICATE OF COUNSEL

I, _____,

Attorney for Petitioner, International Union of Operating Engineers, Local 450, AFL-CIO, do hereby certify that this Motion for Rehearing is filed in good faith and not for delay and that same

is filed for the purpose of bringing to the Court's attention a recent case which, in the opinion of counsel, is controlling of the case at bar.

W. ARTHUR COMBS